

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNY BROWN,
Petitioner,

v.

JOSIE GASTELO, Warden,¹
Respondent.

Case Nos. [17-cv-01409-YGR](#) (PR)
[18-cv-02110-YGR](#) (PR)

**ORDER; AND INSTRUCTIONS TO
CLERK**

I. BACKGROUND

On March 15, 2017, Petitioner Kenny Brown, a state prisoner, filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a conviction from the Alameda County Superior Court. *See* Dkt. 1 in *Brown v. Gastelo*, Case No. C 17-1409 YGR (PR). The operative petition in that matter is the Eighth Amended Petition, which was filed on November 16, 2017. Dkt. 35 in Case No. C 17-1409 YGR (PR). According to Petitioner, on January 26, 2004, in Alameda County Superior Court case number 144451, he pled nolo contendere to attempted murder and admitted various prior-conviction and gun enhancements, in exchange for a sentence of twenty-four years in state prison. *Id.* at 1.² Beginning in May of 2017, Petitioner challenged the execution of his sentence in state habeas petitions filed in the state courts. *Id.* at 2-3. His state habeas petitions were denied. *Id.* The Court notes that the Eighth Amended Petition contains four claims challenging the lawfulness of the 1993 conviction that was used to enhance his 2004 sentence. *Id.* at 4-5. On March 30, 2018, the Court found that it did not appear from the face of the Eighth Amended Petition that it was without merit and ordered Respondent to file an answer showing cause why the Eighth Amended Petition should not be granted or, in the alternative, a motion to dismiss on procedural grounds. Dkt. 39 in Case No. C 17-1409 YGR (PR). Both

¹ Josie Gastelo, the current warden of the prison where Petitioner is incarcerated, has been substituted as Respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

² Page number citations refer to those assigned by the Court's electronic case management filing system and not those assigned by Plaintiff.

parties have since filed numerous motions, including a motion to dismiss (dkt. 47 in Case No. C 17-1409 YGR (PR)) by Respondent, and various motions by Petitioner pertaining to the Eighth Amended Petition (dks. 41, 43, 44, 45, 46, 48, 49, 52, 58, 59, 60 in Case No. C 17-1409 YGR (PR)) as well as his motion to file an opposition to Respondent's motion to dismiss (dkt. 53 in Case No. C 17-1409 YGR (PR)), his motion for a bail hearing (dkt. 42 in Case No. C 17-1409 YGR (PR)), his motion for default judgment (dkt. 55 in Case No. C 17-1409 YGR (PR)), his motion for summary judgment (dkt. 63 in Case No. C 17-1409 YGR (PR)), and his remaining motions which will be construed as motions for expedited ruling (dks. 50, 51 in Case No. C 17-1409 YGR (PR)).

On April 3, 2018, Petitioner filed a second *pro se* petition for a writ of habeas corpus under § 2254 in the Central District of California. *See* Dkt. 1 in *Brown v. Gastelo*, Case No. C 18-2110 YGR (PR). On April 5, 2018, the Central District ordered the case transferred to the Northern District because it was challenging a conviction from the Alameda County Superior Court. Dkt. 5 in Case No. C 18-2110 YGR (PR). The case was thereafter transferred from the Central District to this Court on April 10, 2018. Dkt. 8 in Case No. C 18-2110 YGR (PR). This second petition contains five claims, also challenging the lawfulness of the 1993 conviction that was used to enhance his 2004 sentence. Dkt. 1 at 2 in Case No. C 18-2110 YGR (PR). Petitioner has also filed several motions in Case No. C 18-2110 YGR (PR), including his motion for leave to proceed *in forma pauperis* (dkt. 10 in Case No. C 18-2110 YGR (PR)), his motions pertaining to the second petition (dks. 11, 13, 14 in Case No. C 18-2110 YGR (PR)), his motion for an extension of time to file a notice of appeal (dkt. 12 in Case No. C 18-2110 YGR (PR)), and his motion for a default judgment (dkt. 15 in Case No. C 18-2110 YGR (PR)).

II. DISCUSSION

A. Requirement to File a Single Petition

All claims pertaining to the same state conviction should be included in a *single* petition for a writ of habeas corpus under 28 U.S.C. § 2254. The Eighth Amended Petition filed on November 16, 2017 in Case No. C 17-1409 YGR (PR) is DISMISSED with leave to amend and file, within **twenty-eight (28) days** of this Order, a Ninth Amended Petition containing *all claims*

for relief. Petitioner must use the attached habeas petition form and ensure that it includes the correct caption and civil case number, *Brown v. Gastelo*, Case No. C 17-1409 YGR (PR), and the words “Ninth Amended Petition” on the first page. Because the Eighth Amended Petition is being dismissed with leave to amend, all Petitioner’s motions pertaining to the Eighth Amended Petition (dks. 41, 43, 44, 45, 46, 48, 49, 52, 58, 59, 60 in Case No. C 17-1409 YGR (PR)) are DENIED as moot, Respondent’s pending motion to dismiss (dkt. 47 in Case No. C 17-1409 YGR (PR)) is dismissed without prejudice to refiling once the Court sets a new briefing schedule after Petitioner files his Ninth Amended Petition, and Petitioner’s motion to file an opposition to Respondent’s motion to dismiss (dkt. 53 in Case No. C 17-1409 YGR (PR)) is DENIED as moot.

Failure to file a proper Ninth Amended Petition within the designated time will result in the dismissal without prejudice of Case No. C 17-1409 YGR (PR).

Petitioner’s request to proceed *in forma pauperis* in Case No. C 18-2110 YGR (PR) is GRANTED. Dkt. 10. The Clerk of the Court is directed to DISMISS Case No. C 18-2110 YGR (PR) as duplicative and terminate all pending motions therein as moot (dks. 11-15).

All future filings shall be in Case No. C 17-1409 YGR (PR) only.

B. Motion for Bail in Case No. C 17-1409 YGR (PR)

A district court may have the authority to release a state prisoner on bail pending resolution of a habeas proceeding, but only in extraordinary cases involving special circumstances or a high probability of success. *Land v. Deeds*, 878 F.2d 318, 318-19 (9th Cir. 1989) (citing *Aronson v. May*, ___ U.S. ___, 85 S. Ct. 3, 5 (1964) (requiring both exceptional circumstances and high probability of success)). Some examples of exceptional circumstances are serious deterioration of the Petitioner’s health while incarcerated; short sentences for relatively minor crimes so near completion that extraordinary action is essential to make collateral review truly effective; or, possibly, extraordinary delay in processing a habeas corpus petition. *See Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989); *Calley v. Callaway*, 496 F.2d 701, 702 n.1 (5th Cir. 1974). No such exceptional circumstances (or high probability of success) are present here. *Accord In re Roe*, 257 F.3d 1077, 1079-80 (9th Cir. 2001) (district court erred in releasing prisoner on bail during the pendency of his district court habeas proceeding, because allegations of actual

innocence, failing health, discovery abuses by opponent and available lodging did not satisfy the Land standard for release). Accordingly, Petitioner's motion for a bail hearing is DENIED. Dkt. 42 in Case No. C 17-1409 YGR (PR).

C. Motion For Default Judgment in Case No. C 17-1409 YGR (PR)

On June 21, 2018, Petitioner filed a motion entitled, "Motion to Dismiss Prosecution[']s Case Procedurally Defaulted Eighth Amended Petition," which has been construed as a request that the Court enter a default judgment against Respondent for failure to answer the Order to Show Cause. Dkt. 55 in Case No. C 17-1409 YGR (PR).

As mentioned above, the Court issued an Order to Show Cause on March 30, 2018, which directed Respondent to file within sixty days an answer showing cause why the Eighth Amended Petition should not be granted or, in the alternative, a motion to dismiss on procedural grounds. Dkt. 39 in Case No. C 17-1409 YGR (PR). Respondent's motion to dismiss was timely filed on May 23, 2018. Dkt. 47 in Case No. C 17-1409 YGR (PR). Accordingly, Petitioner's motion for default judgment is DENIED. Dkt. 55 in Case No. C 17-1409 YGR (PR).

D. Motion For Summary Judgment in Case No. C 17-1409 YGR (PR)

The Court will not address the merits of Petitioner's motion for summary judgment filed in Case No. C 17-1409 YGR (PR), because said motion is not procedurally appropriate, and also is unnecessary to the Court's decision in that matter. *See* Dkt. 63 in Case No. C 17-1409 YGR (PR). The procedure for deciding habeas corpus petitions in this Court involves the issuance of an Order to Show Cause, Respondent filing an answer or a dispositive motion, and Petitioner filing a traverse or an opposition to the dispositive motion. This is the procedure contemplated by Rules 4 and 5 of the Federal Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, and is also the procedure set forth by the Court in the scheduling section of its Order to Show Cause in the instant matter. *See* Dkt. 39 at 1-2 in Case No. C 17-1409 YGR (PR). In accordance with said procedure, Respondent has filed a motion to dismiss, which has been denied without prejudice in light of the Court directing Petitioner to file a Ninth Amended Petition. There is no provision for or need for the additional step of a motion for summary judgment. Accordingly, Petitioner's motion for summary judgment is hereby STRICKEN from the record.

1 Dkt. 63 in Case No. C 17-1409 YGR (PR).

2 **E. Motion for Expedited Ruling in Case No. C 17-1409 YGR (PR)**

3 The Court DENIES Petitioner's requests for an expedited ruling of the Eighth Amended
4 Petition in Case No. C 17-1409 YGR (PR). Dkts. 50, 51 in Case No. C 17-1409 YGR (PR). As
5 explained above, Petitioner has been directed to file his Ninth Amended Petition, and no ruling on
6 the merits of his claims can be made at this time.

7 **III. CONCLUSION**

8 For the forgoing reasons, the Court orders as follows:

9 1. The Eighth Amended Petition filed on November 16, 2017 in Case No. C 17-1409
10 YGR (PR) is DISMISSED with leave to amend. No later than **twenty-eight (28) days** of the date
11 of this Order, Plaintiff shall file a Ninth Amended Petition in Case No. C 17-1409 YGR (PR)
12 containing ***all claims*** for relief. Petitioner must use the attached habeas petition form and ensure
13 that it includes the correct caption and civil case number, *Brown v. Gastelo*, Case No. C 17-1409
14 YGR (PR), and the words "Ninth Amended Petition" on the first page. **Failure to file a proper**
15 **Ninth Amended Petition within the designated time will result in the dismissal without**
16 **prejudice of Case No. C 17-1409 YGR (PR).**

17 2. Because the Eighth Amended Petition is being dismissed with leave to amend, all
18 Petitioner's motions pertaining to the Eighth Amended Petition (dkts. 41, 43, 44, 45, 46, 48, 49,
19 52, 58, 59, 60 in Case No. C 17-1409 YGR (PR)) are DENIED as moot, Respondent's pending
20 motion to dismiss (dkt. 47 in Case No. C 17-1409 YGR (PR)) is dismissed without prejudice to
21 refiling once the Court sets a new briefing schedule after Petitioner files his Ninth Amended
22 Petition, and Petitioner's motion to file an opposition to Respondent's motion to dismiss (dkt. 53
23 in Case No. C 17-1409 YGR (PR)) is DENIED as moot.

24 3. Petitioner's request to proceed *in forma pauperis* in Case No. C 18-2110 YGR (PR)
25 is GRANTED. Dkt. 10 in Case No. C 18-2110 YGR (PR).

26 4. The Clerk is directed to DISMISS Case No. C 18-2110 YGR (PR) as duplicative,
27 close that file, and terminate all pending motions therein as moot. Dkts. 11-15 in Case No. C 18-
28 2110 YGR (PR).

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